Filed 8/31/12 Shannon v. City of Beverly Hills CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

RACHEL SHANNON, Plaintiff and Appellant, v. CITY OF BEVERLY HILLS, Defendant and Respondent.	B236711 (Los Angeles County Super. Ct. No. BC435944)

APPEAL from a judgment of the Superior Court of Los Angeles County. Rolf Treu, Judge. Reversed.

Excelus Law Group and William W. Bloch for Plaintiff and Appellant.

Bryan Cave, Donald L. Samuels, and Diba D. Rastegar for Defendant and Respondent.

Rachel Shannon brought this action for gender discrimination against her employer, the City of Beverly Hills. The City claims Shannon agreed to a settlement of the action; Shannon denies that claim and maintains she never agreed to settle the action. The trial court ordered that Shannon is judicially estopped from denying the existence of an enforceable settlement agreement, denied as untimely her motion for reconsideration of that order and entered judgment for the City on the purported settlement agreement. We hold that the reconsideration motion was timely and, in any case, at least one of the elements of judicial estoppel is not met. Accordingly, since the City concedes the purported settlement agreement cannot be enforced pursuant to Code of Civil Procedure section 664.6, we reverse the judgment and remand the matter to the trial court to be restored to the civil active list.

FACTS AND PROCEEDINGS BELOW

In April 2010, Shannon filed an action for gender discrimination against the City of Beverly Hills.

On March 8, 2011, Shannon's counsel filed a "Notice of Settlement of Action" in which he stated that the parties had reached a settlement and would be filing a request for dismissal with prejudice within 60 days.

The following day the attorneys for Shannon and the City filed a stipulation that provided in relevant part: "[D]ue to the settlement of the case, the City does not need to produce to Plaintiff the confidential documents" previously ordered by the trial court. Upon receipt of that stipulation the court entered an order stating that based upon the settlement of the case, it is ordered "that Defendant City of Beverly Hills does not need to produce to Plaintiff Rachel Shannon the confidential records specified by the Court . . . ."

On March 11, 2011, the court issued a minute order in which it "deem[ed] case settled in its entirety," ordered that "[a]ny remaining dates in this department are therefore advanced to this day and vacated" and set a date for a hearing on an "Order to Show Cause re Dismissal[.]" (Capitalization omitted.) The court's order vacated the date set for the City's motion for summary judgment and the trial date.

On March 29, 2011, Shannon's attorney filed a motion to be relieved as counsel to be heard on the same day as the OSC re dismissal.

The City filed a response to the OSC on April 12, 2011, claiming that Shannon, through her attorney, had entered into a settlement agreement but was now attempting to renege on the deal. The City asked the court to rule that Shannon was judicially estopped from denying the settlement and to dismiss her action with prejudice.

In a declaration dated April 18, 2011, plaintiff's counsel represented to the court that Shannon "recently changed her position regarding settlement of this case."[1]

On May 11, 2011, Shannon, represented by a new attorney, filed a declaration opposing dismissal of the action claiming: "I have never signed a settlement agreement, nor have I agreed to a settlement in this case."

The court heard argument on the OSC re dismissal on May 26, 2011. Shannon's first attorney was present at the hearing. He did not contend that Shannon authorized him to enter into a settlement agreement with the City. On the contrary, he represented to the court that Shannon never saw the draft agreement that he was discussing with the City's attorney and that once she saw the written proposed agreement she "had reservations." The court found that Shannon was judicially estopped from denying the existence of a settlement agreement between the parties and ordered judgment upon the terms of that settlement agreement.

On May 26, 2011, the court clerk served Shannon by mail with written notice of entry of the court's order. On June 10, 2011, Shannon filed a motion for reconsideration of the court's order finding that the case was settled.

On August 4, 2011, the trial judge ruled the motion for reconsideration untimely and refused to consider it.

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[1] The copy of this document in the record lacks a file stamp but by including it in her Appendix, Shannon represents that it is an accurate copy of a document in the superior court file. (Cal. Rules of Court, rule 8.124(g).)

Finally, on August 16, 2011, the City mailed notice of entry of judgment in this action and Shannon filed a timely appeal.

DISCUSSION

I. THE MOTION FOR RECONSIDERATION WAS TIMELY

The court erred in ruling the motion for reconsideration was untimely.

Code of Civil Procedure section 1008, subdivision (a) requires that a motion for reconsideration be filed within 10 days after service of written notice of entry of the order. Under Code of Civil Procedure section 1013, subdivision (a), service of the order by mail extends the 10-day period by five calendar days. (See Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2012) [¶] 9:326.1.) Thus, Shannon had a total of 15 days in which to file her motion for reconsideration. She filed it on the 15th day.[2]

Although the motion for reconsideration was timely, reversing the judgment and remanding the case for a hearing on the motion would unnecessarily expend litigant and judicial resources given that the issue of judicial estoppel has been thoroughly briefed by the parties in this appeal. We turn to the merits of that issue.

II. AT LEAST ONE ELEMENT OF JUDICIAL ESTOPPEL IS NOT MET

The City does not contend that the settlement is enforceable pursuant to Code of Civil Procedure section 664.6[3] (see *Levy v. Superior Court* (1995) 10 Cal.4th 578, 585) but argues that the settlement agreement made on Shannon's behalf by her first attorney

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[2] The City erroneously contends that the five-day mailing extension does not apply to a notice of motion for reconsideration. The case it cites, *Advanced Building Maintenance v. State Comp. Ins. Fund* (1996) 49 Cal.App.4th 1388, 1392, did not involve and did not discuss the five-day mailing extension.

[3] Section 664.6 states in relevant part: "If parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement."

is enforceable under the doctrine of judicial estoppel which prevents a party from taking two inconsistent positions in the same or some earlier proceeding. (*Gottlieb v. Kest* (2006) 141 Cal.App.4th 110, 130-131.) The primary focus of the doctrine of judicial estoppel is on protecting the integrity of the judicial process (*id.* at p. 131), although it may also be used to protect against unfairness between the parties (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc*. (2005) 36 Cal.4th 412, 424).

California courts consider five factors in determining whether judicial estoppel applies. In *Aguilar v. Lerner* (2004) 32 Cal.4th 974, 986-987, our high court held: "'The doctrine [most appropriately] applies when '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.' [Citations.]"

The City, as the party asserting judicial estoppel, had the burden of proof as to each fact essential to that claim. (Evid. Code, § 500.) The City failed to establish the fifth factor—that the first position was not taken as a result of ignorance or mistake.

The record is devoid of any evidence that Shannon authorized the purported settlement, and Shannon flatly declared that she never "agreed to a settlement in this case." When given the opportunity to contradict her denial, Shannon's first attorney did not do so. Indeed, counsel admitted at the hearing on the OSC re dismissal that when Shannon actually saw the written settlement agreement she had "reservations." This shows that the position taken by counsel was the result of mistake or ignorance, and the record contains nothing to the contrary. In particular, counsel's ambiguous statement that Shannon "recently changed her position regarding settlement of this case" does not constitute substantial evidence to the contrary—it does not say that Shannon had ever *agreed* to the settlement and may have meant only that Shannon had previously been interested in settling but no longer was.

Because at least one of the requirements for judicial estoppel is not met, we need not discuss the other requirements.

DISPOSITION

The judgment is reversed and the case is remanded to the trial court with directions to reinstate it on the civil active list, reinstate its discovery order and reset the hearing on the motion for summary judgment. Appellant is awarded her costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

JOHNSON, J.